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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 863

GLORIA L. MESSINA, as Administratrix of the goods, chattels and credits which were of JOSEPH C. MESSINA, deceased,

Petitioner,

v.

CLARK EQUIPMENT COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on February 2, 1959.

Citations to Opinions Below

The District Court did not render an opinion herein. The opinion of the Court of Appeals, printed in Appendix A hereto, *infra*, page 13, is reported in 263 F. 2d 291.

Jurisdiction

The judgment of the Court of Appeals was entered on February 2, 1959 (Appendix A, p. 20, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Question Presented

Whether, under New York law, in an action against the manufacturer of a machine for the wrongful death of the operator of the machine, where, concededly, the manufacturer failed to follow a general industry practice and custom of installing safety devices to avoid precisely the accident which caused the operator's death, the question of the manufacturer's negligence should have been allowed to go to the jury.

Statement

This is an action to recover for the wrongful death of plaintiff's intestate (hereinafter referred to as "decedent"). The jurisdiction of the District Court was based upon diversity of citizenship (R. 2a).

Decedent was killed in November, 1955, while operating an earth mover at a building project in Port Chester, New York (R. 7a-8a; 12a-13a). The earth mover was manufactured by defendant (R. 4a) and had been purchased several months before by a corporation of which decedent was a one-third owner (R. 10a-12a).

The earth mover had a large bucket device suspended in front of the machine (Appendix A, *infra*, p. 14). The bucket device was raised and lowered by two scissor arms, pivoted to the machine behind the driver's compartment, one on either side (Appendix A, *infra*, p. 14). In order to allow a mechanic to get at and repair a leak in the gas tank in front of the machine, decedent raised the scissor arms and the bucket (R. 7a-9a; 12a-15a). Decedent then shut off the motor which operated the scissor arms and bucket (R. 15a-16a; 19a) and was apparently getting out of the cab when the bucket fell (R. 8a-9a; 15a-16a). Decedent was crushed between the scissors arm and cab, receiving injuries that resulted in his death (R. 8a-9a; 15a-

16a). Decedent left surviving him his wife (petitioner herein) and two infant children (R. 3a).

Concededly, plaintiff established at the trial that there was a general industry practice and custom among manufacturers of similar machines to provide guards and safety devices to either prevent an operator from getting into or out of the cab while the scissors arms were raised or to require him to step over the scissors arm (R. 17a-18a; 20a-23a; 25a-36a). Concededly, the earth mover manufactured by the defendant did not have these safety devices to avoid the accident which caused decedent's death (R. 22a-25a). Notwithstanding, the District Court dismissed the complaint at the end of plaintiff's case, refusing to allow the question of defendant's negligence to go to the jury (R. 36a-37a).

Over vigorous and cogent dissent by Judge Clark, the court below affirmed the District Court's dismissal of plaintiff's complaint on the authority of two decisions by the New York Court of Appeals in which the question here—negligence predicated upon failure to follow a general industry practice and custom of providing safety devices—was not even involved. *Campo* v. *Scofield*, 301 N. Y. 468 (1950); *Inman* v. *Binghamton Housing Authority*, 3 N. Y. 2nd 137 (1957). (The *Campo* and *Inman* decisions are printed, respectively, in Appendices D and E, *infra*, pp. 29, 36.)

The majority of the court below read certain answers by plaintiff's counsel to certain questions of the District Court as constituting in effect a stipulation that defendant's earth mover was free from any latent defect or danger. (This premise of the majority's decision is accepted perforce by us for purposes of this petition for certiorari; we respectfully refer in passing, however, to Judge Clark's discussion of this point in his opinion (Appendix A, *infra*, p. 18).) And since the majority of the court below read the decisions of the New York Court

of Appeals in *Campo* and *Inman* as limiting the liability of manufacturers to injuries from defects and dangers which were latent or concealed, in contradistinction to injuries from defects and dangers which were patent and manifest, the court below, as noted, affirmed the dismissal of the instant suit for the wrongful death of decedent, notwithstanding, as also noted, the complete inappositeness here of the *Campo* and *Inman* decisions.

Reasons for Granting the Writ

The decision of the court below is in direct conflict with the applicable decisions of the New York Court of Appeals, the highest court of the State of New York. Moreover, the decision of the court below conflicts in principle with one of its own previous decisions, unanimously rendered, in which the opinion was written by Judge Clark, dissenting in this case, and on which neither of the judges comprising the instant majority sat. The gross error of the court below involves a question of law of far-reaching importance in the area of product liability in New York and, moreover, grievously resulted in the dismissal of an action for wrongful death, the ultimate wrong.

1. It has heretofore been the accepted law in New York that evidence of failure to conform to a general industry practice and custom may be considered by the jury in determining negligence. This in fact was explicitly recognized without reservation by the court below in one of its prior decisions (discussed, *infra*, p. 8), wherein it said: "New York has adopted the generally honored rule that testimony of the practices of others may be adduced in order to place an allegation of negligence in a context of general usage, thus assisting the jury in formulating the standard of care of reasonable men. The rule is available to plaintiffs to show departure from and defendants to show adherence to an accepted standard."

Lee v. *Pennsylvania R. Co.*, 192 F. 2d 226, 229 (2nd Cir., 1951) (printed in Appendix C hereto, *infra*, p. 23).

2. The New York Court of Appeals has unequivocally held that liability may be predicated upon failure to comply with a general practice or custom of equipping a machine or instrumentality with safety devices or guards to prevent injury, even from a danger that is patent and manifest. Thus, in *Regan* v. *Eight Twenty Fifth Corp.*, 287 N. Y. 179 (1941) (printed in Appendix B hereto, *infra*, p. 21), where the legs of a person operating an open-platform elevator were forced over the end and side of the platform and were crushed between the elevator and shaft walls when the material such person was carrying on the elevator shifted, a jury verdict was obtained against defendant owner of the premises on evidence, *inter alia*, of failure to comply with a general custom of installing metal sides upon elevators. The Appellate Division, in reversing the judgment for plaintiff and in dismissing the complaint, said (260 App. Div. 583, 586; 23 N.Y.S. 2nd 217, 220): "If we were to concede that there was a danger connected with the use of the elevator, the plaintiff who had operated it on a number of prior occasions must have been aware of that fact. He knew that it was not enclosed except by the sides of the shaftway." The Court of Appeals, in reversing the Appellate Division and affirming the judgment for plaintiff, held (287 N. Y. 179, 182) (Appendix B, *infra*, p. 22):

> "Plaintiff introduced uncontradicted opinion testimony to the effect that there were two safety devices in general customary use in the community upon elevators of the type involved. One consisted of 'key switches' which enable an operator to stop such an elevator in emergencies. The other was the installation of metal sides upon the elevator. The trial judge submitted to the jury the question whether such gen-

eral custom and usage existed, whether the failure to comply with such usage and custom constituted a failure to exercise reasonable care under the circumstances here presented, and whether such failure was the direct proximate cause of the injury. By its verdict the jury resolved those questions in plaintiff's favor. The admission of the testimony and the charge thereon was correct. *Garthe* v. *Ruppert*, 264 N. Y. 290, 296, 190 N. E. 643. It cannot be said as a matter of law that there was no evidence from which the jury could infer that the absence of a stopping device or the absence of metal sides upon the elevator was the proximate cause of the accident. It was, therefore, error to reverse the judgment upon questions of law and to dismiss the complaint."

And significantly, *Garthe* v. *Ruppert*, 264 N. Y. 290 (1934), relied upon as authority by the Court of Appeals in the *Regan* case, also involved a danger that was patent and manifest. There, plaintiff fell upon the floor of a toilet in a brewery that was slippery and in sloppy condition because the workers used the toilet as a place to clean up. Plaintiff, who had been in the brewery's employ for many years and who on the occasion in question was visiting the brewery as a customer, in the words of the Court of Appeals (264 N. Y. 290, 295), "was familiar with the place [toilet] and the use, and * * * the toilet was fully lighted and the condition of the floor apparent to anyone using his eyes." The Court of Appeals, though holding that it was error to admit evidence that another brewery was maintained in a less sloppy manner since this did not constitute a custom, stated that (264 N. Y. 290, 296) "When, however, a custom has prevailed in the trade or in the calling, or certain dangers have been removed by a customary way of doing things safely, this custom may be proved to show that a manufacturer or any one else employing men has fallen below the required standard" and that "General usage or custom may be shown in order to estab-

lish a standard of construction and equipment. When a question of negligence is involved the general usage or practice is competent to show either ordinary care or the failure to exercise such care."

Thus, where a 10-year-old boy was injured when he inserted his finger into the open spout of a coffee grinder which he knew was on, the New York Court of Appeals, in affirming a directed verdict in favor of defendant grocery store, stated that, "There was no proof that any usual or customary guards were omitted." *Connelly v. Carrig*, 244 N. Y. 81, 83 (1926). And in an action against the employer of plaintiff's intestate who slipped and whose clothing was caught by two set screws which projected from an unguarded revolving shaft, the New York Court of Appeals, in affirming a jury verdict for defendant, held admissible testimony by defendant's experts that it was not customary to manufacture such shafts with covering or guards over them because such evidence was not only competent to meet plaintiff's evidence to the contrary but "to show the standard of construction according to general usage" and that "The common usage of the business is a test of negligence * * * [though] not a conclusive or controlling test." *Shannahan v. Empire Engineering Corp.*, 204 N. Y. 543, 549-50 (1912).

In the instant case, in the language of Judge Clark, "plaintiff has shown a general industry practice of installing safety devices to avoid precisely the accident which caused the death of plaintiff's decedent" (Appendix A, *infra*, pp. 17-18). Hence, the decision of the court below is in irreconcilable conflict with the foregoing decisions of the New York Court of Appeals, which decisions are, of course, entirely applicable to a negligence action against a manufacturer by the ultimate or remote user. For, under the landmark doctrine of *MacPherson v. Buick Motor Co.*, 217 N. Y. 382 (1916), the liability of manufacturers is governed by generally applicable principles of negligence; thus, for example, the instant principle of liability predi-

cated upon failure to comply with a general practice or custom of safety has been specifically applied to hold a manufacturer liable to the remote user. E.g., *Smith* v. *Peerless Glass Co.*, 259 N. Y. 292 (1932).

3. The decision by the majority of the court below also conflicts in principle with its previous unanimous decision in *Lee* v. *Pennsylvania R. Co., supra.* There, a boy fell on an escalator and caught his fingers between the stationary combing of the upper floor proper and the moving treads of the escalator. In holding admissible evidence showing that the construction of the newer escalators was safer because the space between the moving treads was narrower, the court below, on which neither of the judges comprising the majority in the instant case sat and speaking through Judge Clark, dissenting in this case, held that (192 F. 2d 226, 230; Appendix C, *infra*, p. 28). "There is no question but that [under New York law] safer and better practices can be shown in evidence if it is accompanied by a charge that such does not control the issue of negligence."

The possibility of becoming caught between the combing of the upper floor and the moving treads of the escalator would certainly appear to constitute a manifest danger. The significant point, however, is that this question was not even discussed, it being necessarily implicit in the decision that the court below did not consider this question material to the result. Accordingly, there is a conflict at least in principle between the previous unanimous decision in *Lee* v. *Pennsylvania R. Co., supra,* and the decision of the instant majority.

4. The settled law of New York that custom or usage may be shown to establish negligence is not affected in any wise by the decisions of the New York Court of Appeals in *Campo* and *Inman*, for, as noted, those cases have nothing to do with this question.

In *Campo*, the Court of Appeals sustained the dismissal of a complaint alleging that plaintiff was engaged in feeding onions into an "onion topping" machine when his hands became caught in its revolving steel rollers and alleging further that defendant manufacturers had been negligent in failing to equip the machine with a guard or stopping device. There was no allegation, as in the instant case (R. 2a-3a), of failure to comply with a general industry practice or custom. In this context, the New York Court of Appeals said that, "The cases establish that the manufacturer of a machine or any other article, dangerous because of the way in which it functions, and patently so, owes to those who use it a duty merely to make it free from latent defects and concealed dangers" (301 N. Y. 468, 471; Appendix D, *infra*, p. 30) and that "It may well be argued that, since the development of mechanical contrivances has created so many new dangers, manufacturers should be compelled to equip complicated modern machinery with all possible protective guards or other safety devices. If, however, the manufacturer's liability is to be so extended, if so fundamental a change is to be effected, we deem it the function of the legislature rather than of the courts to achieve that change" (301 N. Y. 468, 474-75; Appendix D, *infra*, p. 34).

Similarly, in *Inman*, suit was brought against the architect, builder and owner, respectively, of an apartment house for injury to a two-year-old child who fell off a one-step stoop or porch at the rear entrance to the apartment house, the complaint alleging negligence in design and construction in that, among other things, there was no protective railing or guard to prevent the occupants from falling off the stoop or porch. Again, there was no allegation of failure to comply with a general industry practice or custom. Upon authority of *Campo*, the complaint was dismissed in *Inman* on the ground that there was no allegation of any latent defect or concealed danger (3 N. Y. 2d 137, 145; Appendix E, *infra*, p. 40).

Since in the *Campo* and *Inman* cases the complaint did not allege failure to comply with a general industry practice or custom, those cases are entirely inapposite here. As was pointed out by Judge Clark, "Here, we have both the allegation and the proof of the facts [a general industry practice of installing safety devices] absent in the *Campo* case" and that "In the *Campo* and *Inman* decisions the New York Court of Appeals expressed its feeling that only the legislature, and not the relatively free speculation of a jury, should impose on an entire industry a duty to install all possible safety devices. But it is quite a different matter merely to permit a jury to hold a manufacturer to such standards as have been overwhelmingly and voluntarily adopted by his industry" (Appendix A, *infra*, pp. 17, 19). Indeed, *Campo* cites as authority (301 N. Y. 468, 474; Appendix D, *infra*, p. 33) the decision in *Stevens* v. *Allis-Chalmers Mfg. Co.*, 151 Kan. 638, 644, 100 P. 2d 723, 726 (1940), which held that a manufacturer of farm machinery was not liable for injuries sustained by plaintiff when his clothes caught in a whirling middle universal joint which was in open and plain view, the court there stating that "In 1937 [the time of the accident], so far as shown by the evidence, no device to enclose the middle universal joint had been devised or shown to be practical."

With respect to the *Campo* and *Inman* decisions, the majority of the court below said the following:

> "Apparently in *Inman*, as in *Campo*, there was no express allegation in the complaint of a general custom to provide a safety device. We think, however, that fact was implicit in extract from the complaint set forth above. And in any event, under the unequivocal language of the opinion, even with such an allegation included the complaint would not have stated a cause of action." (Appendix A, *infra*, p. 16)

The "extract from the complaint" referred to in the majority's opinion is an extract from the *Inman* case, as

follows: the "complaint charged negligence in the design and construction of the building which created a 'hazardous' and extremely dangerous condition,' in the stoop area, 'well-knowing that * * * [it] would be used by infant children' and that the danger stemmed from the absence of 'a protective railing, guard, or any device whatever to protect the occupants * * * from falling' " (Appendix A, *infra*, p. 15). This falls far short of an allegation, express or "implicit," of failure to comply with a general industry practice or custom to provide a safety device. Indeed, in *Campo*, it was stated that allegations that "the [onion topping] machine was negligently designed and constructed and was in a defective and imminently dangerous condition" were "purely conclusory allegations" and "of course do not spell out a cause of action" and further that "the complaint merely recites that defendants failed and omitted to provide any guards" (301 N. Y. 468, 471-72; Appendix D, *infra*, p. 30). And far from there being "unequivocal language" in the *Campo* and *Inman* opinions, as asserted by the majority below, that an allegation of failure to comply with a general industry practice and custom of providing safeguards would still not have stated a cause of action, there is nothing in the *Campo* and *Inman* opinions which even suggests such a result or that the New York Court of Appeals was overturning, *sub silientio*, the well settled law of New York to the direct contrary. Accordingly, we respectfully submit that the majority of the court below in their reading of the *Campo* and *Inman* decisions committed gross and grievous error, which can only be rectified by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JULIAN BUCHBINDER,
Counsel for Petitioner.

April 20, 1959.

APPENDIX A

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 44—October Term, 1958.

GLORIA L. MESSINA, as administratrix, etc.,

Plaintiff-Appellant,

v.

CLARK EQUIPMENT COMPANY,

Defendant-Appellee.

Before:

CLARK, *Chief Judge,* and
HINCKS and LUMBARD, *Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York, Thomas F. Murphy, *Judge,* dismissing the plaintiff's case after her evidence was in. Affirmed.

HINCKS, *Circuit Judge:*

This is a case brought to recover for the death of the plaintiff's intestate. The action was tried by a jury. Diversity of citizenship was the only ground of jurisdiction in the court below. The only question presented by this appeal is whether the dismissal of the complaint, after the plaintiff's case was in, was based on a proper interpretation of New York law.

Appendix A.

The plaintiff's intestate was killed while operating an earth mover manufactured by the defendant. The earth mover had a large bucket device suspended in front of the machine, which was raised and lowered by two scissor arms, pivoted to the machine behind the driver's compartment, one on either side. The accident occurred when a gas leak in the machine was being repaired; in order to allow mechanics to get at the leak, the decedent had raised the scissor arms and the bucket. He then shut off the motor and was apparently getting out of the cab when the bucket fell. He was crushed between the scissor arms and the cab.

The plaintiff did not claim that the accident was caused by any latent defect in the manufacture of the machine. Her complaint was based solely upon the theory, supported by evidence at the trial, that it was customary among manufacturers of similar machines to provide guards and safety devices to prevent an operator from getting into or out of the cab while the arms were raised. Her attorney expressly disavowed other bases for recovery. The dismissal was based upon the ground that under New York law a manufacturer owes no duty to a remote user beyond the duty to keep the article of manufacture free from hidden defects or dangers. *Campo* v. *Scofield*, 301 N. Y. 468, 95 N. E. 2d 802; *Inman* v. *Binghamton Housing Authority*, 3 N. Y. 2d 137, 143 N. E. 2d 895.

Upon this appeal the plaintiff contends that in this case the allegations and proof of a general standard among manufacturers to provide safety devices for such machines as that involved here, take the case outside the reach of *Campo* and *Inman*. But we think these cases make it plain that the manufacturer's liability is limited to hidden defects and concealed dangers. Indeed, in *Campo* it was said: "The cases establish that the manufacturer of a machine or any other article, dangerous because of the

way in which it functions, and patently so, owes to those who use it a duty merely to make it free from latent defects and concealed dangers. Accordingly, if a remote user sues a manufacturer of an article for injuries suffered, he must allege and prove the existence of a latent defect or a danger not known to plaintiff or other users." The *Campo* opinion further states: "If a manufacturer does everything necessary to make the machine function properly for the purpose for which it is designed, if the machine is without any latent defect, and if its functioning creates no danger or peril that is not known to the user, then the manufacturer has satisfied the law's demands." And in *Campo* it was further observed with apparent approval: "In point of fact, several of the cases actually declare that a duty is owned, a liability imposed, *only if* the defect or danger be not 'known' or 'patent' or discoverable 'by a reasonable inspection.'" (Emphasis as in *Campo* opinion.)

And if the *Campo* decision left any doubt of the New York law on the point, the doubt was set at rest by the *Inman* case decided as recently as 1957. The suit had been brought against the architect and builder of an apartment house for injury to a child who fell from an unprotected stoop. The complaint charged negligence in the design and construction of the building which created a "hazardous and extremely dangerous condition," in the stoop area, "well-knowing that * * * [it] would be used by infant children" and that the danger stemmed from the absence of "a protective railing, guard, or any device whatever to protect the occupants * * * from falling." Although the court held that the principle of *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050, was not inapplicable because the action was concerned with a defect in real estate rather than a chattel, it went on to hold that under the *MacPherson* doctrine the complaint

here was insufficient to state a cause of action. It expressly reaffirmed and quoted at some length from its *Campo* decision. It added: "And, since the presence of a latent defect or a danger not generally known is precedent to the manufacturer's liability, the absence of such a recital in the complaint is fatal to the existence of a cause of action." Apparently in *Inman*, as in *Campo*, there was no express allegation in the complaint of a general custom to provide a safety device. We think, however, that fact was implicit in the extract from the complaint set forth above. And in any event, under the unequivocal language of the opinion, even with such an allegation included the complaint would not have stated a cause of action.

In the instant case, plaintiff's counsel conceded, and necessarily so, that he made no claim of a latent defect or a danger unknown to the decedent. We think only a forced reading of the New York cases would avoid their application to this case. In 2 Harper & James, The Law of Torts § 28.5 (1956), the *Campo* decision was cited several times with critical comment. However that may be, the court, in its *Inman* decision, although citing Harper & James and hence fully cognizant of the comment therein, reaffirmed *Campo*. Apparently the court still felt that an extension of the *MacPherson-Buick* rule to cover an obvious defect in design and an obvious danger could properly be accomplished only by legislation—a view previously expressed in *Campo*. And we must apply the law as enunciated by the Court of Appeals of the State. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.

Affirmed.

CLARK, *Chief Judge* (dissenting):

In New York, as well as elsewhere, the extent of one's duty to refrain from negligent conduct is measured by the scope of the risk which such conduct foreseeably entails.

Palsgraf v. *Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99, 59 A. L. R. 1253. And this law is the same for manufacturers as for other members of society. *Crist* v. *Art Metal Works*, 230 App. Div. 114, 243 N. Y. S. 496, 499, affirmed 255 N. Y. 624, 175 N. E. 341; *Noone* v. *Fred Perlberg, Inc.*, 268 App. Div. 149, 49 N. Y. S. 2d 460, 463, affirmed 294 N. Y. 680, 60 N. E. 2d 839; *Liedeker* v. *Sears, Roebuck & Co.*, 249 App. Div. 835, 292 N. Y. S. 541, affirmed 274 N. Y. 631, 10 N. E. 2d 586. The *Campo* and *Inman* decisions did not shift the basic inquiry as to the reasonable foreseeability of the danger to a sterile definitional quibble over whether the injury was caused by a "latent" or a "patent" defect.

Since the majority concede that *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050, is still a correct statement of New York law, I am puzzled by their suggestion that the *Campo* decision sweepingly relieved manufacturers from liability for defects or dangers discoverable by a reasonable inspection. The theory on which plaintiff recovered in *MacPherson* was that the defect in the automobile wheel was one which the defendant could have discovered by a reasonable inspection. Obviously the basic inquiry in *MacPherson* and all such cases is what dangers the manufacturer foresaw or reasonably should have foreseen to users of its product. See *Crist* v. *Art Metal Works, supra*, 230 App. Div. 114, 243 N. Y. S. 496; *Noone* v. *Fred Perlberg, Inc., supra*, 268 App. Div. 149, 49 N. Y. S. 2d 460; *Liedeker* v. *Sears, Roebuck & Co., supra*, 249 App. Div. 835, 292 N. Y. S. 541. Indeed the *Campo* opinion itself heavily stresses this: "• • • entirely lacking is any allegation of fact indicating that defendants foresaw or should reasonably have foreseen a danger to one using the machine for its intended purpose. As we have observed, those omissions are fatal." 301 N. Y. 468, 472, 95 N. E. 2d 802.

Here we have both the allegation and the proof of the facts absent in the *Campo* case. The plaintiff has shown

a general industry practice of installing safety devices to avoid precisely the accident which caused the death of plaintiff's decedent; surely this indicates, prima facie at least, that defendant should reasonably have foreseen a danger to persons using its machines, and should have foreseen that many such operators do not realize this danger. And hence the case is for the jury, not the judge, to decide.

Nor can the result in this case be upheld on the basis of a concession of counsel upon which the majority so heavily rely. As I read the response of plaintiff's counsel to the court's questions, I think it clear that he did not concede that the *danger* was known, only that the parts of the earth mover which by their improper design created the danger were themselves visible and apparent.[1] And even if counsel's answers might conceivably be pressed further, I believe it unjust to do so; they should be read as making the proper and obvious concession that the facts showed, but not one entirely improper on the record. As *Campo* and *Inman* repeatedly state, it is knowledge of the danger itself —here that the bucket of the earth mover might drop when least expected, even while the motor of the machine is turned off—which is significant.[2] We cannot rule as a matter of law from the evidence below or from judicial notice that this danger in defendant's machine was either generally known or even known to plaintiff's decedent.

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[1] "The Court: You don't claim a latent defect, do you?
"Mr. Buchbinder: I do not, sir, no.
"The Court: Or a danger unknown to the plaintiff?
"Mr. Buchbinder: I don't claim that.
"The Court: Entirely lacking as to any recital of the absence of guards or a stopping device was unknown to him. You don't claim that.
"Mr. Buchbinder: I don't claim that.

* * * * *

"The Court: To understand you further, you don't claim any hidden or latent defect?
"Mr. Buchbinder: No, sir."

Appendix A.

In the *Campo* and *Inman* decisions the New York Court of Appeals expressed its feeling that only the legislature, and not the relatively free speculation of a jury, should impose on an entire industry a duty to install all possible safety devices. But it is quite a different matter merely to permit a jury to hold a manufacturer to such standards as have been overwhelmingly and voluntarily adopted by his industry. See *Stevens* v. *Allis-Chalmers Mfg. Co.*, 151 Kan. 638, 100 P. 2d 723, cited with approval and followed in the *Campo* opinion. While only the legislature ought sweepingly to change general safety practices, it is ill suited to fulfill the task of bringing every errant manufacturer into line. I do not think the New York Court of Appeals meant to shunt this responsibility off to that body. Here again I believe we are applying state law more rigidly than would the state courts themselves. Hence I think it error that the judge refused to submit the case to the jury.

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[2] "* * * the presence of a latent defect or a danger not generally known is precedent to the manufacturer's liability. * * * Entirely lacking, to paraphrase what we said in the *Campo* case, *supra*, 301 N. Y. 468, 471, 95 N. E. 2d 802, is any suggestion that the structure possessed a latent defect or an unknown danger." *Inman* v. *Binghamton Housing Authority*, 3 N. Y. 2d 137, 145, 143 N. E. 2d 895. "In short, in the present case, we have nothing that is related to, or stems from, the existence of a latent fault or hidden danger in either design or construction." *Id.*, 3 N. Y. 2d 137, 146, 143 N. E. 2d 895. See also *Henry* v. *Crook*, 202 App. Div. 19, 195 N. Y. S. 642; *Crist* v. *Art Metal Works*, 230 App. Div. 114, 243 N. Y. S. 496.

Appendix A.

Judgment

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of February one thousand nine hundred and fifty nine.

Present: HON. CHARLES E. CLARK, *Chief Judge,*
HON. CARROLL C. HINCKS,
HON. J. EDWARD LUMBARD,
Circuit Judges.

GLORIA L. MESSINA, as Administratrix, etc.,

Plaintiff-Appellant,

v.

CLARK EQUIPMENT COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREFORE, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed, with costs to the appellee.

A. DANIEL FUSARO,
Clerk

APPENDIX B

Regan v. Eight Twenty Fifth Corporation[1]

CONWAY, Judge.

The plaintiff was injured while using an open-platform elevator which operated between the courtyard of defendant's premises and the basement and sub-basement levels of defendant's adjacent apartment building. He was using the elevator to bring up from the basement to the courtyard a "dolly," or low-setting platform on wheels, bearing three empty cans in which he had carried sand from the courtyard to an upper floor of the building where his employer was engaged in completing a plastering contract. Defendant had supplied the cans and the dolly and had directed their use for the transportation of the sand.

Plaintiff was standing on the elevator platform behind the dolly. He had started the elevator by pulling on the hand rope which set it in motion and by which, when it could be grasped, the elevator could be stopped. That hand rope was in the elevator shaft, but was not attached to the elevator. When pulled, it started or stopped electrically operated machinery for the upward or downward movements of the elevator. The hand rope ran over a pulley or sheave which was so located in the shaft that the hand rope could not be reached by one riding on the elevator during the final four feet, eight inches of the ascent. In other words, for that distance on an ascending trip the operator was upon an elevator which it was not possible for him to stop, no matter what was occurring thereon.

On the trip upon which the plaintiff was injured the elevator shook in its ascent; one of the cans toppled for-

[1] While the decision by the majority of the court below conflicts with other decisions of the New York Court of Appeals, in addition to the *Regan* case, considerations of space prevent the printing of such decisions. These other conflicting decisions are discussed *supra*, pp. 5-7.

ward and was caught under the rough stone wall; the pressure caused the dolly to be pushed against plaintiff. He turned to grasp the hand rope, but the elevator had reached such a height that there was not enough of it exposed between the platform and the pulley to permit of its seizure. Plaintiff's legs were forced over the end and side of the platform and were crushed between the elevator and the shaft walls. Plaintiff introduced uncontradicted opinion testimony to the effect that there were two safety devices in general customary use in the community upon elevators of the type involved. One consisted of "key switches" which enable an operator to stop such an elevator in emergencies. The other was the installation of metal sides upon the elevator. The trial judge submitted to the jury the question whether such general custom and usage existed, whether the failure to comply with such usage and custom constituted a failure to exercise reasonable care under the circumstances here presented, and whether such failure was the direct proximate cause of the injury. By its verdict the jury resolved those questions in plaintiff's favor. The admission of the testimony and the charge thereon was correct. Garthe v. Ruppert, 264 N. Y. 290, 296, 190 N. E. 643. It cannot be said as a matter of law that there was no evidence from which the jury could infer that the absence of a stopping device or the absence of metal sides upon the elevator was the proximate cause of the accident. It was, therefore, error to reverse the judgment upon questions of law and to dismiss the complaint.

The judgment of the Appellate Division should be reversed and that of the Trial Term affirmed, with costs in this court and in the Appellate Division.

LEHMAN, C. J., LOUGHRAN, FINCH, RIPPEY, LEWIS, and DESMOND, JJ., concur.

Judgment accordingly.

APPENDIX C

Lee v. Pennsylvania R. Co.

Before SWAN, Chief Judge, and CLARK and FRANK, Circuit Judges.

CLARK, Circuit Judge.

This is an appeal from a judgment on a jury verdict for plaintiffs in an action arising out of injuries sustained by Jerome Linwood Lee, a child of three, while riding an escalator in defendant Pennsylvania Railroad's station in New York City. The plaintiffs are the child himself, suing by his mother, Charlotte Lee, as guardian *ad litem*, and Mrs. Lee, who sues to recover medical expenses and loss of potential services during minority.

The basic facts giving rise to the action are simple and relatively undisputed by either party. During the evening of August 9, 1949, the plaintiff Charlotte Lee, who is blind, entered defendant's station to buy tickets and board the train for Baltimore. She was accompanied by her niece, Victoria White, who was nineteen years old, and by her sons, Calvin, aged 10, and Jerome, together with a nephew, Albert, aged 9, and an infant daughter. While the two ladies were waiting in line for the tickets, the three boys went off to look for the water fountain, and, advised by some passer-by that it was to be found on the level above that on which the ticket windows were located, went on the escalator. The only witnesses to the accident who testified as to this fateful ride were the two older boys. It appears from their evidence that little Jerome stood on the same step of the escalator as his brother, and in front of him. Albert, the cousin, rode one or two steps behind. Somehow—and here the evidence was unclear as to whether it was due to the chance jostling of other passengers or because of the carelessnes of the youthful plaintiff—Jerome fell as the escalator was approaching the upper level of the station and his hand became wedged

in the space between the stationary combing extending out from the floor proper and the moving treads on which he was standing. The injuries he sustained necessitated the amputation of his middle finger and scarred another on one hand.

In their case in chief, the plaintiffs adduced evidence as to negligence by the defendant in two respects: (1) improper policing of the escalator to prevent the danger which might stem from a crowded condition there, and (2) negligent maintenance of the escalator, in that, specifically, the openings between the treads and the combing were larger than necessary and that the dangers thus inherent in it were magnified by a bent tooth of the combing at one point. After a trial the jury returned a verdict of $6,000 for the infant plaintiff and $1,500 for his mother, and from the judgment entered upon the verdict the defendant appealed.

The defendant's first contention, that the evidence was insufficient to sustain the jury's verdict, is without legal merit. We may concede that plaintiffs have erected a rather shaky edifice of actual negligence upon the shifting sands of carelessness inferred from the naked accident. Their evidence of crowding and pushing on the escalator, for instance, is to be culled from the hazy and obviously rehearsed testimony recited by the two young boys and from that of Victoria. Each, it is true, spoke in terms of "a big crowd," "they began to shove," "crowd of people," "the crowd of people started pushing," "a big bunch of people," "looked like hundreds of people still trying to get on," "they began to shove as we got near the top," and so on. All this does not demonstrate just how the ill-defined crowd actually caused the plaintiff to fall. Nor can we say that the evidence of negligent care of the escalator was more convincing. Calvin stated that when he pulled Jerome's hand "out in between the escalators . . . one part had a little small opening and the other one

was crooked," and later defended his statement by saying, "There would have been no other way that he could have gotten his hand in if it hadn't been crooked." Plaintiff's expert witness testified that the spaces between the tread and combing were wider than necessary. And this was buttressed by some inconclusive photographs of that part of the escalator which seem to indicate that one of the teeth of the combing was somewhat out of alignment, thus permitting a larger aperture than was originally intended.

But we are asked not only to agree that such evidence is indirect and requires a broad bridge of inference to permit the conclusion of actual negligence. White v. Lehigh Valley R. Co., 220 N.Y. 131, 115 N.E. 439, but to say also that it lacked sufficient substance to go to the jury. With the first contention we are in accord; with the second we cannot agree. Such issues are particularly within the realm of the jury. It is their function to decide the question of negligence and to this end they must weigh the witnesses' credibility and the reasonableness of the inferences which they are asked to make. As we have had occasion to point out several times, e. g., Korte v. New York, N. H. & H. R. Co., 2 Cir., 191 F.2d 86, recent Supreme Court cases have emphasized this function of the jury and reversed attempts to constrict it. Here plaintiffs made out a *prima facie* case of negligence, and hence the trial judge did not err in submitting the case to the jury.

We are not called upon to discuss the subordinate question of the sufficiency by itself of the evidence as to the policing of the escalator to prevent crowding. The District Court permitted the jury to weigh this allegation, as well as the ground of negligent maintenance of the equipment, under the general statement that "the defendant owed them [plaintiffs] a duty * * * to use reasonable care to make their premises reasonably safe," which he

characterized as a "doctrine * * * for the protection of its customers or passengers or people." At no time did defendant question this form of submission of the two charges jointly by any separate attack upon one of those grounds or request for separate verdicts or otherwise. Thus while this charge of negligence alone may not have presented a jury issue, the problem is not before us. A general verdict is upheld where there is substantial evidence supporting any ground of recovery in favor of an appellee. Cross v. Ryan, 7 Cir., 124 F. 2d 883, certiorari denied Ryan v. Cross, 316 U.S. 682, 62 S.Ct. 1269, 86 L.Ed. 1755; Kinser v. Riss & Co., 7 Cir., 177 F.2d 316. The situation is otherwise where timely objection has been made to the submission of a ground inadequately supported along with one duly supported by the evidence. But to preserve such a contention for the consideration of the appellate tribunal, the matter must be specifically called to the attention of the trial judge in order that he may have the opportunity to consider the asserted insufficiency as to one specification and correct himself, if necessary, by removing it from the jury's consideration. Flint v. Youngstown Sheet & Tube Co., 2 Cir., 143 F.2d 923; Alaska Pacific Salmon Co. v. Reynolds Metals Co., 2 Cir., 163 F.2d 643.

Defendant's second contention of reversible error arises out of the cross-examination of its expert witness, one Claypool, who, as an engineer employed by the Otis Elevator Company, testified on direct as to the construction of escalators made by his employer. Stating that this escalator had probably been installed in 1938, he went on to point out the construction of the combing area and to give the measurements between the teeth—3/8ths of an inch—distances which he said could not be reduced on this type of installation. On cross-examination, plaintiffs' counsel elicited information as to improvements in Otis escalators, and then, over the objections of defendant, induced the

witness to testify that in 1946 Otis manufactured a type of escalator with narrower treads than those on the one in defendant's station—separated in fact only ¼th of an inch. Defendant objects to the admission of this evidence in cross-examination.

New York had adopted the generally honored rule that testimony of the practices of others may be adduced in order to place an allegation of negligence in a context of general usage, thus assisting the jury in formulating the standard of care of reasonable men. This rule is available to plaintiffs to show departure from and defendants to show adherence to an accepted standard. Shannahan v. Empire Engineering Corp., 204 N.Y. 543, 98 N.E. 9, 44 L.R.A.,N.S., 1185; Gardner v. Friederich, 25 App.Div. 521, 49 N.Y.S. 1077, affirmed 163 N.Y. 568, 57 N.E. 1110; Lerner v. Sears, Roebuck & Co., 274 App.Div. 905, 83 N.Y.S.2d 59. But such custom or usage, when shown, is not conclusive on the issue of negligence. Saglimbeni v. West End Brewing Co., 274 App.Div. 201, 80 N.Y.S.2d 635, affirmed 298 N.Y. 875, 84 N.E.2d 638; Radin v. State, 192 Misc. 247, 80 N.Y.S.2d 189. Nor is the rule to be warped into a requirement that the defendant use the latest or safest equipment. Bennett v. Long Island R. Co., 163 N.Y. 1, 57 N.E. 79; Harley v. Buffalo Car Mfg. Co., 142 N.Y. 31, 36 N.E. 813.

The question presented by this case, however, is whether or not admission of evidence of the safest practices invariably constitutes reversible error. Defendant cites Garthe v. Ruppert, 264 N.Y. 290, 190 N.E. 643, to this effect. There the court, reversing on other grounds, held incompetent evidence that another brewery had installed a more efficient method of disposing of the wet grain mash whose slipperiness on defendant's floor had caused plaintiff's fall. Although the court there repeats the admonition that there is no obligation to use the best and latest equipment, it appears that the real harm lay in the fact that plaintiff's evidence alluded to the practice of only

one other brewery,[1] and that there was no effort in the evidence to generalize from this to any widely accepted practices.

We think therefore that the evidence here was admissible, followed as it was by a specific charge made at the end of the general instructions by the judge that the defendant was not obliged "to have the best equipment or the safest place, but only such as are reasonably safe and appropriate for the business." There is no question but that safer and better practices can be shown in evidence if it is accompanied by a charge that such does not control the issue of negligence. Rothstein v. Monette, City Ct. N.Y., 17 N.Y.S.2d 369, 373; Bennett v. Long Island R. Co. 163 N.Y. 1, 57 N.E. 79. Here a charge to that effect was the last thing the jury heard before they began their deliberations. Garthe v. Ruppert, 264 N.Y. 290, 190 N.E. 643, merely declares evidence of an isolated example of more careful practice incompetent as proof of a generally accepted higher standard. Therefore it does not cover this case. Here evidence was of a substantially more generalized nature, for it referred to a type of escalator which, in addition to being the standard piece of equipment offered by the largest manufacturer in the field, for three years prior to the accident had been adopted and installed widely through the country. True, the Pennsylvania Railroad Company is not obliged to install a new escalator every time Otis changes its latest model. But the jury was warned that it was not to construe the evidence in this fashion. Thus it was not error to admit the testimony as to such generally accepted equipment of a later time than that on which the injury occurred merely because such equipment happened to be safer than defendant's model.

Judgment affirmed.

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[1] "Never, however, has it been permitted to take one or two instances as a gauge or guide in place of the custom of the trade." Garthe v. Ruppert, 264 N.Y. 290, 296, 190 N.E. 643, 646.

APPENDIX D

Campo v. Scofield

FULD, Judge.

Plaintiff, working on his son's farm, was engaged in feeding onions into an "onion topping" machine, when his hands became caught in its revolving steel rollers and were badly injured. He brought suit against defendants, manufacturers of the machine, alleging that they had been negligent in failing to equip it with a guard or stopping device. The sufficiency of the complaint is challenged by motion under rule 106 of the Rules of Civil Practice.

The topping machine, on wheels and attached to a tractor which supplied the power for its operation, consisted of four hard steel rollers about four feet long and three inches wide set in a rectangular iron frame with wooden sides. The cutting was accomplished by the revolving and grinding of the steel rollers. In order to start or stop it, it was necessary to shift the gear on the tractor about fifteen feet away from where the operator of the machine stood.

The complaint—as supplemented by a bill of particulars—alleges that defendants manufactured and sold to Henry Benthin an onion-topping machine and that in November of 1945, while plaintiff was assisting in the harvesting of a crop of onions on the farm of his son and while he was dumping a crate of onions into the machine, his hands became caught in its revolving rollers and were so injured that it became necessary to amputate them; that defendants impliedly represented to the public, and to plaintiff who relied on the representations, that the machine had been properly designed, manufactured and guarded and was a safe and proper machine to be used for topping onions, whereas in fact it was inherently dangerous; that the machine was "negligently manufac-

tured, constructed, and designed" in that defendants "negligently and carelessly failed and omitted to provide and supply any guard or guards of any kind that would prevent the user of said machine from coming in contact with the * * * rollers * * * although it was entirely practicable and feasible" to have done so; and that, in addition, defendants were negligent "in failing to provide appliances * * * by the use of which * * * [the machine and rollers] might have been stopped or thrown out of gear before the hands of the plaintiff became caught in the pinch between the swift revolving rollers * * * thus lessening the extent of the injuries to the said plaintiff".

Since there is no claim of privity of contract between the defendant manufacturer and plaintiff, the complaint cannot, of course, be sustained on any theory of implied warranty. See, e. g., Turner v. Edison Stor. Battery Co., 248 N.Y. 73, 161 N.E. 423. If it is to be upheld, it must be because it states a cause of action in negligence. The Appellate Division ruled that it does not and we agree.

The cases establish that the manufacturer of a machine or any other article, dangerous because of the way in which it functions, and patently so, owes to those who use it a duty merely to make it free from latent defects and concealed dangers. Accordingly, if a remote user sues a manufacturer of an article for injuries suffered, he must allege and prove the existence of a latent defect or a danger not known to plaintiff or other users. Examination of the complaint before us reveals the absence of any such recital. Apart from the purely conclusory allegations that the machine was negligently designed and constructed and was in a defective and imminently dangerous condition—which of course do not spell out a cause of action, see, e. g., Schweitzer v. Mindlin, 248 N.Y. 560, 162 N.E. 524, see, also 3 Carmody on New York

Practice 2d ed., § 915, pp. 1745-1754—the complaint merely recites that defendants failed and omitted to provide any guards that would prevent the user of the machine from coming in contact with the revolving rollers and to provide a stopping device by means of which one whose hand became caught in the rollers could stop the machine and thereby lessen the extent of the injury. Entirely lacking is the slightest suggestion that the machine possessed a latent defect or a danger unknown to plaintiff, entirely lacking is any recital that the absence of guards or a stopping device was unknown to him; and entirely lacking is any allegation of fact indicating that defendants foresaw or should reasonably have foreseen a danger to one using the machine for its intended purpose. As we have observed, those omissions are fatal.

If a manufacturer does everything necessary to make the machine function properly for the purpose for which it is designed, if the machine is without any latent defect, and if its functioning creates no danger or peril that is not known to the user, then the manufacturer has satisfied the law's demands. We have not yet reached the state where a manufacturer is under the duty of making a machine accident proof or foolproof. Just as the manufacturer is under no obligation, in order to guard against injury resulting from deterioration, to furnish a machine that will not wear out, see Auld v. Sears, Roebuck & Co., 288 N.Y. 515, 41 N.E. 2d 927, affirming 261 App. Div. 918, 25 N.Y.S. 2d 491, so he is under no duty to guard against injury from a patent peril or from a source manifestly dangerous. To illustrate, the manufacturer who makes, properly and free of defects, an axe or a buzz saw or an airplane with an exposed propeller, is not to be held liable if one using the axe or the buzz saw is cut by it, or if some one working around the airplane comes in contact with the propeller. In such cases, the manufacturer has

the right to expect that such persons will do everything necessary to avoid such contact, for the very nature of the article gives notice and warning of the consequences to be expected, of the injuries to be suffered. In other words, the manufacturer is under no duty to render a machine or other article "more" safe—as long as the danger to be avoided is obvious and patent to all.

To impose upon a manufacturer the duty of producing an accident-proof product may be a desirable aim, but no such obligation has been—or, in our view, may be—imposed by judicial decision. Suffice it to note that, in cases dealing with a manufacturer's liability for injuries to remote users, the stress has always been upon the duty of guarding against *hidden* defects and of giving notice of *concealed* dangers. See e. g., Rosebrock v. General Elec. Co., 236 N.Y. 227, 140 N.E. 571 (electric transformers, improperly packed); MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, L.R.A.1916F. 696 (defective automobile wheel); Statler v. George A. Ray Mfg. Co., 195 N.Y. 478, 88 N.E. 1063, (imperfectly manufactured coffee urn); Torgesen v. Schultz, 192 N.Y. 156, 84 N.E. 956, 18 L.R.A. N.S., 726 (defective aerated water bottle); Devlin v. Smith, 89 N.Y. 470 (imperfectly constructed scaffold). In point of fact, several of the cases actually declare that a duty is owed, a liability imposed, *only if* the defect or danger be not "known" or "patent" or discoverable "by a reasonable inspection". Genesee Co. Patrons Fire Relief Ass'n v. H. Sonneborn Sons, 263 N.Y. 463, 468, 189 N.E. 551, 552; see also, Noone v. Fred Perlberg, Inc., 268 App. Div. 149, 152; 49 N.Y.S.2d 460, 462, affirmed 294 N.Y. 680, 60 N.E.2d 839; O'Connell v. Westinghouse X-Ray Co., 288 N.Y. 486, 41 N.E.2d 177, reversing 261 App. Div. 8, 24 N.Y.S.2d 268; see, also, Grant v. Australian Knitting Mills (1936) A.C. 85; Restatement of Law of Torts, § 388, comment *i*, p. 1047; 3 Cooley, Law of Torts (4th ed.), § 498; Bohlen, Studies in the Law of Torts (1926), p. 126. Lan-

guage particularly apt was used by the Privy Council of England in the Grant case, supra (1936) A.C. 85; after calling attention to the fact that in Donoghue v. Stevenson [1932] A.C. 562, "the danger was hidden, and the thing • • • dangerous only because of want of care in making it", the tribunal went on to say: "One further point may be noted. The principle of Donoghue's case [1932] A.C. 562, 583, 593 [i. e., the MacPherson v. Buick Motor Co. doctrine] can only be applied where the defect is hidden and unknown to the consumer, otherwise the directness of cause and effect is absent: the man who consumes or uses a thing which he knows to be noxious cannot complain in respect of whatever mischief follows, because it follows from his own conscious volition in choosing to incur the risk or certainty of mischance" (p. 105). And Professor Bohlen in his work on Torts, after noting "the impolicy of requiring the manufacturer to make so perfect a machine as to be incapable of injurious misuse", goes on to say (op. cit., p. 126): "As to this there can be no two opinions, but there is no need to invoke public policy to afford this protection. The manufacturer cannot be required to contemplate a misuse by any careless, ignorant, or incompetent person into whose hands the machine may come; injury through the medium of such an agency is neither a probable nor natural result of anything done or left undone by the maker."

There have been a number of cases in other states involving injuries from farming machinery and implements in which the courts have refused after trial to hold manufacturers negligent merely because the equipment was dangerous and no guards were furnished. See, e. g., Stevens v. Allis-Chalmers Mfg. Co., 151 Kan. 638, 100 P.2d 723; Foster v. Ford Motor Co., 139 Wash. 341, 246 P. 945, 48 A.L.R. 934; Yaun v. Allis-Chalmers Mfg. Co., 253 Wis. 558, 34 N.W.2d 853; see, also, Davis v. Sanderman, 225 Iowa 1001, 282 N.W. 717. In the Yaun case, supra, 253

Wis. 558, 34 N.W.2d 853, plaintiff, while working on a hay baler, fell in such a way that his arm was caught between the unguarded rollers of the machine and was crushed. He sued the manufacturer and prevailed in the trial court. He sought an affirmance upon the theory that a manufacturer of an article functionally dangerous is liable to a user who sustains injuries " 'by reason of the manufacturer failing to exercise reasonable care in the adoption of a safe plan or design * * * *whether the danger be open or hidden*' " emphasis supplied; 253 Wis. at page 563, 34 N.W.2d at page 856. The Wisconsin Supreme Court, holding that such was not the law, reversed the judgment and dismissed the complaint. Pointing out that "The danger of the rollers was apparent in the present case", the court quoted from one of its earlier decisions, Dugenske v. Wyse, 194 Wis. 159, 165, 215 N.W. 829, as follows: " 'It is true that a silo filler is a simple device. Any person of ordinary intelligence must be presumed to know that, if his fingers got between the rollers and under the knives, serious consequences would result' " 253 Wis. at page 568, 34 N.W.2d at page 858. And, added the court, "If respondent's contention were sound, every meat grinder or other machine capable of mangling fingers would be an instrument the safe use of which would be guaranteed by the manufacturer". 253 Wis. at page 569, 34 N.W.2d at page 858.

It may well be argued that, since the development of mechanical contrivances has created so many new dangers, manufacturers should be compelled to equip complicated modern machinery with all possible protective guards or other safety devices. If, however, the manufacturer's liability is to be so extended, if so fundamental a change is to be effected, we deem it the function of the legislature rather than of the courts to achieve that change. (See Roscoe Pound, New Theories of Liability, 8 Bar Bulletin, N. Y.

Co Lawyers, Assn. [May, 1950], pp. 32, 35.) In Wisconsin, for instance, such a course has been adopted with respect to "corn shredders"; a statute requires such machines to be provided "with safety or automatic feeding devices" in order to protect their operators from "accident by the snapping rollers, husking rollers, and shredding knives". Wis.Stat.1949, § 167.12, p. 2072. The legislature of this state, however, has not acted in the field, having chosen to impose a duty only upon employers to furnish guards for certain types of machinery and appliances used in factories. See Labor Law, § 256; see, also, e. g., Matter of Gawrys v. Buffalo Bolt Co., 276 App.Div. 1035, 95 N.Y.S.2d 442; McEwen v. Borden's Condensed Milk Co., 214 N.Y. 674, 108 N.E. 1099.

In conclusion, then, since the duty owed by a manufacturer to remote users does not require him to guard against hazards apparent to the casual observer or to protect against injuries resulting from the user's own patently careless and improvident conduct, the complaint was properly dismissed.

The judgment of the Appellate Division should be affirmed, with costs.

LOUGHRAN, C. J., and LEWIS, CONWAY, DESMOND, DYE and FROESSEL, JJ., concur.

Judgment affirmed.

APPENDIX E

Inman v. Binghamton Housing Authority

FULD, Judge.

Six years after an apartment house had been completed and turned over to the owner, this action was brought against the architects who designed the structure and the builder who constructed it, as well as the owner, to recover for injuries suffered by a child of a tenant when he fell off a stoop or porch. We are here concerned with the sufficiency of plaintiffs' complaint and defendant owner's third-party complaint against the builder and architects.

William Inman, an infant, lived with his parents in an apartment leased by them from the Binghamton Housing Authority. When he was two years old he fell off the stoop, a built-up area at the rear entranceway to the apartment, one "step" above the concrete pavement, and was injured.[1] Two separate suits were brought on behalf of the child, one against the Housing Authority and the other against the architects, defendants Lacey, and the builder, defendant Vincent J. Smith, Inc. In the action in which it was named as defendant, the Housing Authority served a third-party complaint against the builder and the architects, asserting a right to indemnification in the event of a recovery against it.

The Inmans' complaint against the architects and builder alleges that they were tenants residing in a first-floor apartment in Saratoga Terrace, a public housing project in the City of Binghamton, owned and operated by the Binghamton Housing Authority; that the building had been erected in 1948 by the defendant Smith following the "plan and design" of the defendants Lacey; that on May 24, 1954, while the two-year-old plaintiff was attempting to enter

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[1] Neither the height of the step nor the distance that the child fell, that is, the vertical distance from the stoop to the pavement, is disclosed.

his apartment, he fell from the stoop, sustaining severe injuries; that the architects and builder, the former in designing and planning and the latter in proceeding with construction, created a "hazardous and extremely dangerous condition," in the stoop area, "well-knowing that • • • [it] would be used by infant children". The danger created, according to the complaint, stemmed from three alleged defects: first, and this is the crux of the asserted negligence, the absence of "a protective railing, guard, or any device whatever to protect the occupants" and other persons "from falling" off the stoop; second, the fact that the rear door opened outward in the porch "in such manner" that those on the porch "are required to back precariously close to the edge"; and, finally, that the "step leading from [the] porch or stoop to the sidewalk" was "grossly inadequate" in that it was in the center of the porch and did not extend along its entire length.

The third-party complaint, brought by the Housing Authority against the architects and builder, sets forth two causes of action against each, one founded on a common-law right to indemnification and the other upon provisions of contract.

Upon motions by the builder and the architects to dismiss the third-party complaint, the court at Special Term dismissed the causes of action not based on contract. Some time later, when they moved to dismiss the Inmans' complaint against them, the court, holding that no actionable negligence was alleged, granted the motion and dismissed the complaint.

Appeals from the various orders and judgments subsequently entered in each action were consolidated by stipulation, and the Appellate Division, reversing in part, decided that the Inmans' complaint stated a cause of action within "The doctrine announced in the case of MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E.

1050, L.R.A.1916F, 696" and that, except for the contract cause of action against the architects, which it dismissed, the third-party complaint presented issues of fact requiring trial. The Appellate Division granted permission to appeal and certified five questions of law.

Putting aside for the moment the third-party complaint and addressing ourselves solely to the suit brought by the Inmans, the questions presented are, first, do the principles underlying the rule announced in MacPherson v. Buick Motor Co., supra, 217 N.Y. 382, 111 N.E. 1050, L.R.A.1916F, 696—holding a manufacturer of an inherently dangerous chattel, defectively made, liable for injuries to remote users—also apply to those who plan and put up structures on real property and, second, if they do, do the allegations in the present complaint establish the existence of liability.

Although this court has not had occasion to cite MacPherson v. Buick Motor Co., supra, 217 N. Y. 382, 111 N.E. 1050, L.R.A.1916F, 696, in cases dealing with structures erected upon real property, it is to be noted that this is not the first case in which we considered whether a builder or a building contractor may be held accountable in negligence for injuries to a third person not in privity with him. (See Adams v. White Construction Co., 299 N.Y. 641, 87 N.E.2d 52 reversing 274 App. Div. 1072, 85 N.Y.S. 2d 837.) We decided in favor of responsibility, our decision therein, as well as that of the Appellate Division in this case, stemming from an awareness that "there is no visible reason for any distinction between the liability of one who supplies a chattel and one who erects a structure". (Prosser on Torts [2d ed., 1955], § 85, p. 517.) And a number of other courts, likewise encountering nothing more persuasive that the arguments that had proved unavailing when advanced to protect the manufacturers of chattels from liability, have reached the same conclusion. See, e. g., Hanna v. Fletcher, 97 U.S.App.D.C. 310, 231 F.2d 469, 472, cer-

tiorari denied Gichner Iron Works, Inc. v. Hanna, 351 U.S. 989, 76 S.Ct. 1051, 100 L.Ed. 1501; Moran v. Pittsburgh-Des Moines Steel Co., 3 Cir., 166 F.2d 908, 916; Hale v. Depaoli, 33 Cal.2d 228, 230-232, 201 P.2d 1, 13 A.L.R. 2d 183; Del Gaudio v. Ingerson, 142 Conn. 564, 568-569, 115 A.2d 665; Hunter v. Quality Homes, 6 Terry 100, 45 Del. 100, 105-106, 68 A.2d 620; Colbert v. Holland Furnace Co., 333 Ill. 78, 164 N.E. 162, 60 A.L.R. 353; Foley v. Pittsburgh-Des Moines Co., 363 Pa. 1, 34-37, 68 A.2d 517; Berg v. Otis Elevator Co., 64 Utah 518, 525, 231 P. 832; Colton v. Foulkes, 259 Wis. 142, 146-147, 47 N.W.2d 901; see, also, 2 Restatement, Torts, § 385, p. 1030; 2 Harper and James on Law of Torts [1956], § 28.10, pp. 1556-1557; Note, 13 A.L.R. 2d 191. As the Pennsylvania high court declared, "there is no reason to believe that the law governing liability * * * should be, or is, in any way different where real structures are involved instead of chattels. There is no logical basis for such a distinction * * *. The principle inherent in the MacPherson v. Buick Motor Co. case and those that have followed it * * * cannot be made to depend upon the merely technical distinction between a chattel and a structure built upon the land." Foley v. Pittsburgh-Des Moines Co., supra, 363 Pa. 1, 34-35, 68 A.2d 517, 533.

While, therefore, we conclude that the "principle inherent" in the MacPherson doctrine applies to determine the liability of architects or builders for their handiwork, it does not follow that the complaint against the defendant Lacey and the defendant Smith necessarily states a valid cause of action. It must be further examined to ascertain whether it also alleges the other elements deemed essential under MacPherson-Buick.

The cases establish that the manufacturer of a machine or other article, "dangerous because of the way in which it functions, and patently so, owes to * * * [remote users] a duty merely to make it free from latent defects and

concealed dangers." Campo v. Scofield, 301 N.Y. 468, 471, 95 N.E.2d 802, 803. "We have not yet reached the state," we wrote in the Campo case, supra, 301 N.Y. at pages 472-473, 95 N.E.2d at page 804, "where a manufacturer is under the duty of making a machine accident proof or foolproof. * * * Suffice it to note that, in cases dealing with a manufacturer's liability for injuries to remote users, the stress has always been upon the duty of guarding against *hidden* defects and of giving notice of *concealed* dangers. [Cases cited.] In point of fact, several of the cases actually declare that a duty is owed, a liability imposed, *only if* the defect or danger be not 'known' or 'patent' or discoverable 'by a reasonable inspection'." And, since the presence of a latent defect or a danger not generally known is precedent to the manufacturer's liability, the absence of such recital in the complaint is fatal to the existence of a cause of action.

Examination of the pleading before us discloses its invalidity. It contains no allegation of any latent defect or concealed danger. It simply complains of (1) the absence of "a protective railing, guard or any device"; (2) the arc made by the door when opened and (3) the fact that the step did not extend the full length of the stoop, all patently obvious defects, if, indeed, they are defects at all. From none of these recitals may it be said that the architects or the builder violated a duty owed to users of the stoop. Entirely lacking, to paraphrase what we said in the Campo case, supra, 301 N.Y. 468, 471, 95 N.E.2d 802, is any suggestion that the structure possessed a latent defect or an unknown danger and, in the very nature of things, entirely lacking is any recital that the absence of a railing or other device was unknown or undiscoverable. As we have already indicated, such omissions are fatal.

Analysis of the decisions in which a remote user has recovered in tort, be it from a manufacturer, supplier or

contractor, amply demonstrates how different the instant case is. Here, we have nothing like the sudden collapse of an imperfectly constructed scaffold, a defective automobile wheel or a faulty erected concrete ceiling (Devlin v. Smith, 89 N.Y. 470; MacPherson v. Buick Motor Co., supra, 217 N.Y. 382, 111 N.E. 1050, L.R.A.1916F, 696; Adams v. White Construction Co., supra, 299 N.Y. 641, 87 N.E.2d 52); nothing like the breaking of a poorly made handle on a coffee urn (Hoenig v. Central Stamping Co., 273 N.Y. 485, 6 N.E.2d 415); nothing like the explosion of a defectively manufactured soda bottle, aerated water bottle or coffee urn (Smith v. Peerless Glass Co., 259 N.Y. 292, 181 N.E. 576; Torgesen v. Schultz, 192 N.Y. 156, 84 N.E. 956, 18 L.R.A.,N.S., 726; Statler v. George A. Ray Mfg. Co., 195 N.Y. 378, 88 N.E. 1063); nothing like the explosion of an electric transformer, improperly packed (Rosebrock v. General Electric Co., 236 N.Y. 227, 140 N.E. 571). In short, in the present case, we have nothing that is related to, or stems from, the existence of a latent fault or hidden danger in either design or construction. The complaint reveals a one-step stoop, two step high along a part of its length, with no railing or other protective device around it, from which an apparently unattended child fell. Whatever the defect, it may not be said to have been latent, and, whatever the danger, it certainly was not hidden. That being so, it is evident that the requirements of the MacPherson-Buick rule have not been met; the complaint of the Inmans against the architects and the builder is without legal basis and was properly dismissed at Special Term.[1]

* * *

Conway, C. J., and Desmond, Dye, Froessel, Van Voorhis and Burke, JJ., concur.

Order reversed, etc.

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[1] The remainder of opinion, concerning the third-party complaint, is omitted.

FILE COPY

MAY

Supreme Court of the United States

OCTOBER TERM, 1958

No. 863

GLORIA L. MESSINA, as Administratrix of the goods, chattels and credits which were of JOSEPH C. MESSINA, deceased,

Petitioner,

v.

CLARK EQUIPMENT COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT CLARK EQUIPMENT COMPANY IN OPPOSITION

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In the

Supreme Court of the United States

OCTOBER TERM, 1958

No. 863

Gloria L. Messina, as Administratrix of the goods, chattels and credits which were of Joseph C. Messina, deceased,

Petitioner,

v.

Clark Equipment Company,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Second Circuit

BRIEF FOR RESPONDENT CLARK EQUIPMENT COMPANY IN OPPOSITION

Opinions Below

No opinion was delivered in the District Court. The opinion of the Court of Appeals for the Second Circuit (Appendix A—Petitioner's Brief) is reported in 263 Fed. (2d) 291.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on February 2, 1959 (Appendix A, p. 20). The petition for writ of certiorari was served on April 21, 1959.

The jurisdiction of this Court is invoked under Section 1254 (1) of 28 U. S. Code.

Question Presented

Whether under the applicable New York law, a manufacturer of a machine "dangerous because of the way in which it functions and patently so, owes to those who use it a duty merely to make it free from latent defects or concealed dangers."

Statement

Petitioner seeks to review the judgment of the Court of Appeals for the Second Circuit affirming a judgment of the District Court dismissing plaintiff's complaint in an action for wrongful death.

Joseph C. Messina (hereinafter referred to as decedent) sustained fatal injuries on November 17, 1955, at about 3:40 P. M., while operating a machine known as Michigan Tractor Shovel, Model 75 A (hereinafter referred to as machine), at a building project in Port Chester, New York (7a, 10a, 12a).

The machine, manufactured by defendant, had been purchased about 3 months before the accident by Messina & Briante, Inc., on a lease-purchase arrangement from United Traction Company and had been on the said building project for about 30 days (10a, 11a, 43a, 44a).

Decedent was a one-third owner of Messina & Briante, Inc., owner of the said machine (11a, 12a).

Decedent held an Engineer's book in the Engineers' Union to operate a shovel, bulldozer. He could operate any machine the corporation owned (11a) and during the 4 days prior to the accident, no one except the decedent operated the aforesaid machine (43a).

In front of the machine there was a bucket which was attached to the body by 2 arms, one on each side (9a, Pltf's. Exhs. 1-5). To the right of the seat in the operator's compartment there are 2 levers, round knobs mounted on rods 8 to 10 inches long. One lever raises and lowers the bucket and the other dumps, opens and closes the bucket (19a).

Inside the lever itself are notches and when the lever is moved to a position, it detents itself. When the lever is pulled back it is in a notch—a strong rooted poppit in a groove and it takes some effort by the operator to get it out of the notch (19a, 42a). The lever would not move itself by the vibration of the machine. It would take about 8 pounds pressure to move the lever from the position in which it is placed (42a). The bucket can be lowered when the motor is not running but won't come down unless the levers are moved (46a).

Access to the cab was from the left side and not from the right side. On the left side there were steps for the operator to mount (19a, 20a, 44a).

On the day of the accident John Briante, who was a master mechanic, received a report that the gas tank, located in the front of the machine was leaking (9a, 12a, 13a). He saw decedent working with the machine when he got there (12a). The machine was moved 150 to 200 feet along an asphalt road to a dry place (14a). Briante told decedent to raise the bucket so he (Briante) could get under the bucket to get at the gasoline tank. Decedent raised the bucket and shut off the motor (14a, 15a).

Briante was lying on his back under the bucket and, shortly therafter another employee, Rocco Scappatura,

yelled that the bucket was coming down and to run (8a, 13a, 15a, 16a, 48a). Briante ran one way, to the left of the machine, and Scappatura the other (15a).

Scappatura noticed that decedent was between the arm and cab of the machine on the right side. Decedent was facing toward the cab, his hand, head and left leg inside the cab, the arm of the machine across the small of his back and his hip and right leg, which was resting on the top of the tire, were outside the cab. The bucket was one-half way down (8a, 9a, 10a, 16a, 17a, 44a, 45a, 46a).

Briante crawled under the arm on the right side, got into the cab, raised the bucket and he and Scappatura removed the decedent (9a, 10a, 16a, 17a).

A copy of Michigan Tractor Shovel Operators' Manual, 75-A (Deft's. Exh. A) was kept in Messina & Briante, Inc.'s yard, where everyone could look at it (46a, 47a). In said Manual, page 7, were the following instructions:

"Operating Instructions:

"A careful operator is the best insurance possible against an accident, therefore, the following safety rules should be observed at all times.

1. The operator shall not leave the machine without first lowering the bucket so that it rests on the groun and making sure all control levers are in neutral position.

2. Never reach between the boom and guide bar to lower the bucket. The bucket can be lowered to the ground even though the engine has been shut off."

John Briante had never seen the decedent get out of the cab when the bucket was not fully lowered (48a). About two months after the machine was obtained, when he saw some machine operators get out of the cab when the bucket was not on the ground, he warned them against doing so.

not because he had read in the Manual that it was a dangerous practice, but he knew it was dangerous (47a, 48a, 49a).

Petitioner contends, in substance, that the decision of the Court of Appeals for the Second Circuit is (1) contrary to the decisions of the New York Court of Appeals and (2) contrary to a previous decision of the court below.

There is no conflict.

POINT I

Defendant owed no duty to decedent and was therefore not liable to plaintiff.

(a)

No claim was made nor was evidence produced upon the trial of the existence of a latent defect or a danger not known to decedent. In fact, plaintiff conceded that her claim was not based on (1) a latent defect; (2) a danger unknown to decedent; (3) the absence of guards or a stopping device unknown to decedent (49a).

The rule in New York is that a manufacturer owes a duty to remote users "only if the defect or danger be not 'known' or 'patent' or discoverable 'by reasonable inspection'" (*Campo* v. *Scofield*, 301 N. Y. 468, 473).

The aforesaid rule, decisive of the instant case, is discussed at length in the cases of *Campo* v. *Scofield*, 301 N. Y. 468 and *Inman* v. *Binghamton Housing Authority*, 3 N Y. 2d 137.

***Campo* v. *Scofield*, 301 N. Y. 468, 471-475.**

> "The cases establish that the manufacturer of a machine or any other article, dangerous because of the way in which it functions, and patently so, owes to those who use it a duty merely to make it free from latent defects and concealed dangers. Accordingly,

if a remote user sues a manufacturer of an arti for injuries suffered, he must allege and prove t existence of a latent defect or a danger not known plaintiff or other users. Examination of the complai before us reveals the absence of any such recita Apart from the purely conclusory allegations that t machine was negligently designed and constructed an was in a defective and imminently dangerous cond tion—which of course do not spell out a cause o action (see, e.g., *Schweitzer* v. *Mindlin*, 248 N. Y 560; see, also, 3 Carmody on New York Practic [2d ed.], § 915, pp. 1745-1752)—the complaint mere recites that defendants failed and omitted to provi any guards that would prevent the user of the ma chine from coming in contact with the revolving roller and to provide a stopping device by means of whic one whose hand became caught in the rollers coul stop the machine and thereby lessen the extent o the injury. Entirely lacking is the slightest sugges tion that the machine possessed a latent defect o a danger unknown to plaintiff; entirely lacking is any recital that the absence of guards or a stopping devic was unknown to him; and entirely lacking is any allegation of fact indicating that defendants foresaw or should reasonably have foreseen a danger to one using the machine for its intended purpose. As we have observed, those omissions are fatal.

If a manufacturer does everything necessary to make the machine function properly for the purpose for which it is designed, if the machine is without any latent defect, and if its functioning creates no danger or peril that is not known to the user, then the manufacturer has satisfied the law's demands. We have not yet reached the state where a manufacturer is under the duty of making a machine accident proof or foolproof. Just as the manufacturer is under no obligation, in order to guard against injury resulting

from deterioration, to furnish a machine that will not wear out (see *Auld* v. *Sears, Roebuck & Co.*, 288 N. Y. 515, affg. 261 App. Div. 918), so he is under no duty to guard against injury from a patent peril or from a source manifestly dangerous. To illustrate, the manufacturer who makes, properly and free of defects, an axe or a buzz saw or an airplane with an exposed propeller, is not to be held liable if one using the axe or the buzz saw is cut by it, or if some one working around the airplane comes in contact with the propeller. In such cases, the manufacturer has the right to expect that such persons will do everything necessary to avoid such contact, for the very nature of the article gives notice and warning of the consequences to be expected, of the injuries to be suffered. In other words, the manufacturer is under no duty to render a machine or other article 'more' safe—as long as the danger to be avoided is obvious and patent to all.

To impose upon a manufacturer the duty of producing an accident-proof product may be a desirable aim, but no such obligation has been—or, in our view, may be—imposed by judicial decision. Suffice it to note that, in cases dealing with a manufacturer's liability for injuries to remote users, the stress has always been upon the duty of guarding against hidden defects and of giving notice of concealed dangers (See, e.g., *Rosebrock* v. *General Elec. Co.*, 236 N. Y. 227 [electric transformers, improperly packed]; *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382 [defective automobile wheel]; *Statler* v. *Ray Mfg. Co.*, 195 N. Y. 478 [imperfectly manufactured coffee urn]; *Torgesen* v. *Schultz*, 192 N. Y. 156 [defective aerated water bottle]; *Devlin* v. *Smith*, 89 N. Y. 470 [imperfectly constructed scaffold].) In point of fact, several of the cases actually declare that a duty is owed, a liability imposed, only if defect or danger be not 'known' or 'p. ent' or overable 'by reasonable inspection'.

(*Genesee Co. Patrons Fire Relief Assn.* v. *Sonneborn Sons*, 263 N. Y. 463, 468; see, also, *Noone* v. *Fred Perlberg, Inc.*, 268 App. Div. 149, 152, affd. 294 N. Y. 680; *O'Connell* v. *Westinghouse X-ray Co.*, 288 N. Y. 486, revg. 261 App. Div. 8; see, also, *Grant* v. *Australian Knitting Mills* [1936] A. C. 85; Restatement of Law of Torts, § 388, comment i, p. 1047; 3 Cooley, Law of Torts [4th ed.], § 498; Bohlen, Studies in the Law of Torts [1926], p. 126.) Language particularly apt was used by the Privy Council of England in the *Grant* case (*supra* [1936] A. C. 85); after calling attention to the fact that in *Donoghue* v. *Stevenson* ([1932] A. C. 562), 'the danger was hidden and the thing * * * dangerous only because of want of care in making it', the tribunal went on the say: 'One further point may be noted. The principle of *Donoghue's* case [1932] A. C. 562, 583, 595 [i.e., the *MacPherson* v. *Buick Motor Co.* doctrine] can only be applied where the defect is hidden and unknown to the consumer, otherwise the directness of cause and effect is absent: the man who consumes or uses a thing which he knows to be noxious cannot complain in respect of whatever mischief follows, because it follows from his own conscious volition in choosing to incur the risk or certainly of mischance' (p. 105). And Professor Bohlen in his work on Torts, after noting 'the impolicy of requiring the manufacturer to make so perfect a machine as to be incapable of injurious misuse', goes on to say (op. cit., p. 126): 'As to this there can be no two opinions, but there is no need to invoke public policy to afford this protection. The manufacturer cannot be required to contemplate a misuse by any careless, ignorant, or incompetent person into whose hands the machine may come; injury through the medium of such an agency is neither a probable nor natural result of anything done or left undone by the maker.'

There have been a number of cases in other states involving injuries from farming machinery and implements in which the courts have refused after trial to hold manufacturers negligent merely because the equipment was dangerous and no guards were furnished. (See, e.g., *Stevens* v. *Allis-Chalmers Mfg. Co.*, 151 Kan. 638; *Foster* v. *Ford Motor Co.*, 139 Wash. 341; *Yaun* v. *Allis-Chalmers Mfg. Co.*, 253 Wis. 588; see, also, *Davis* v. *Sanderman*, 225 Iowa 1001.) In the *Yaun* case (*supra*, 253 Wis. 558), plaintiff, while working on a hay baler, fell in such a way that his arm was caught between the unguarded rollers of the machine and was crushed. He sued the manufacturer and prevailed in the trial court. He sought an affirmance upon the theory that a manufacturer of an article functionally dangerous is liable to a user who sustains injuries " 'by reason of the manufacturer failing to exercise reasonable care in the adoption of a safe plan or design * * * *whether the danger be open or hidden*' " (emphasis supplied; p. 563). The Wisconsin Supreme Court, holding that such was not the law, reversed the judgment and dismissed the complaint. Pointing out that 'The danger of the rollers was apparent in the present case', the court quoted from one of its earlier decisions (*Dugenske* v. *Wyse*, 194 Wis. 159, 165) as follows: ' "It is true that a silo filler is a simple device. Any person of ordinary intelligence must be presumed to know that if his fingers got between the rollers and under the knives, serious consequences would result," ' (p. 568). And, added the court, 'If respondent's contention were sound, every meat grinder or other machine capable of mangling fingers would be an instrument the safe use of which would be guaranteed by the manufacturer' (p. 569).

It may well be argued that, since the development of mechanical contrivances has created so many new

dangers; manufacturers should be compelled to equip complicated modern machinery with all possible protective guards or other safety devices. If, however, the manufacturer's liability is to be so extended, if so fundamental a change is to be effected, we deem it the function of the legislature rather than of the courts to achieve that change. (See Roscoe Pound, New Theories of Liability, 8 Bar Bulletin, N. Y. Co. Lawyers Assn. [May, 1950], pp. 32, 35.) In Wisconsin, for instance, such a course has been adopted with respect to 'corn shredders'; a statute requires such machines to be provided 'with safety or automatic feeding devices' in order to protect their operators from 'accident by the snapping rollers, husking rollers, and shredding knives' (Wis. Stat., 1949, § 167.12, p. 2072). The legislature of this state, however, has not acted in the field, having chosen to impose a duty only upon employers to furnish guards for certain types of machinery and appliances used in factories. (See Labor Law, § 256; see, also, e.g., *Matter of Gawrys* v. *Buffalo Bolt Co.*, 276 App. Div. 1035; *McEwen* v. *Borden's Condensed Milk Co.*, 214 N. Y. 674.)

In conclusion, then, since the duty owed by a manufacturer to remote users does not require him to guard against hazards apparent to the casual observer or to protect against injuries resulting from the user's own patently careless and improvident conduct, the complaint was properly dismissed."

***Inman* v. *Bingh. Hous. Auth.*, 3 N. Y. 2d 137, 145-146.**

"The cases establish that the manufacturer of a machine or other article, 'dangerous because of the way in which it functions, and patently so, owes to * * * [remote users] a duty merely to make it free from latent defects and concealed dangers.' (*Campo* v. *Scofield*, 301 N. Y. 468, 471.) 'We have not yet reached

the state,' we wrote in the Campo case (*supra*, pp. 472-473), 'where a manufacturer is under the duty of making a machine accident proof or foolproof. • • • Suffice it to note that, in cases dealing with a manufacturer's liability for injuries to remote users, the stress has always been upon the duty of guarding against *hidden* defects and of giving notice of *concealed* dangers. [Cases cited.] In point of fact, several of the cases actually declare that a duty is owed, a liability imposed, *only if* the defect or danger be not "known" or "patent" or discoverable "by reasonable inspection".' And, since the presence of a latent defect or a danger not generally known is precedent to the manufacturer's liability, the absence of such a recital in the complaint is fatal to the existence of a cause of action.

Examination of the pleading before us discloses its invalidity. It contains no allegation of any latent defect or concealed danger. It simply complains of (1) the absence of 'a protective railing, guard or any device,' (2) the arc made by the door when opened and (3) the fact that the step did not extend the full length of the stoop, all patently obvious defects, if, indeed, they are defects at all. From none of these recitals may it be said that the architects or the builder violated a duty owed to users of the stoop. Entirely lacking, to paraphrase what we said in the *Campo* case (*supra*, 301 N. Y. 468, 741), is any suggestion that the structure possessed a latent defect or an unknown danger and, in the very nature of things, entirely lacking is any recital that the absence of a railing or other device was unknown or undiscoverable. As we have already indicated, such omissions are fatal.

Analysis of the decisions in which a remote user has recovered in tort, be it from a manufacturer, supplier or contractor, amply demonstrates how different the instant case is. Here, we have nothing like the sudden collapse of an imperfectly constructed scaffold, a de-

fective automobile wheel or a faultily erected concrete ceiling (*Devlin* v. *Smith*, 89 N. Y. 470; *MacPherson* v. *Buick Motor Co.*, *supra*, 217 N. Y. 382; *Adams* v. *White Constr. Co.*, *supra*, 299 N. Y. 641); nothing like the breaking of a poorly made handle on a coffee urn (*Hoenig* v. *Central Stamping Co.*, 273 N. Y. 485); nothing like the explosion of a defectively manufactured soda bottle, aerated water bottle or coffee urn (*Smith* v. *Peerless Glass Co.*, 259 N. Y. 292; *Torgeson* v. *Schultz*, 192 N. Y. 156; *Statler* v. *Ray Mfg. Co.*, 195 N. Y. 478); nothing like the explosion of an electric transformer, improperly packed (*Rosebrock* v. *General Elec. Co.*, 236 N. Y. 227). In short, in the present case, we have nothing that is related to, or stems from, the existence of a latent fault or hidden danger in either design or construction. The complaint reveals a one-step stoop, two steps high along a part of its length, with no railing or other protective device around it, from which an apparently unattended child fell. Whatever the defect, it may not be said to have been latent, and, whatever the danger, it certainly was not hidden. That being so, it is evident that the requirements of the MacPherson-Buick rule have not been met; the complaint of the Inmans against the architects and the builder is without legal basis and was properly dismissed at Special Term."

Said rule was also applied in the case of *Standard Conveyor Co.* v. *Scott*, 221 F. 2d 460, wherein the Court wrote at page 463:

"It is perfectly obvious that there was nothing latent hidden, or defective about the condition and that the distance between the two conveyors was open and obvious for all to see. We do not believe it can be said that the condition was inherently or imminently dangerous any more than any moving machinery may be said to be inherently or imminently dangerous. To

hold the manufacturer and installer of this equipment liable for injuries would be tantamount to holding the manufacturer and installer of any moving machinery responsible for all injuries connected with its use."

This Honorable Court denied a writ of certiorari in *Standard Conveyor Co.* v. *Scott, supra* (350 U. S. 830).

(b)

It is a fundamental principle of tort law that no action will lie in negligence unless defendant owed a duty to decedent. The absence of any duty "is immediately fatal to plaintiff's cause of action" (*Kimbar* v. *Estis*, 1 N. Y. 2d 399).

As stated in the case of *Palsgraf* v. *Long Island R.R. Co.*, 248 N. Y. 339 at page 342:

"'In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which would have averted or avoided the injury.'

. . . .

'The ideas of negligence and duty are strictly correlative'."

In the absence of a duty to decedent, therefore, no issue as to defendant's negligence arose (*Duree* v. *Wabash R. Co.*, 241 Fed. 454, 457) because "a liability for negligence must depend upon a duty owed by the defendant to the plaintiff which the defendant negligently performed" (*Cohen* v. *Koster*, 133 A. D. 570, 573).

(c)

General custom and usage cannot create a duty—it is only evidence to measure reasonable care when a duty is owed.

Accordingly the case of *Regan* v. *Eight Twenty Fifth Corporation*, 287 N. Y. 179, upon which plaintiff relies in her application for writ of certiorari, is inapplicable to the issue in the instant case because the defendant in the *Regan* case owed Regan the duty of reasonable care. In its opinion the Court pointed out that "Defendant had supplied the cans and the dolly and had directed their use for the transportation of the sand." The defendant, having assumed control of Regan's work, owed him the duty of furnishing reasonably safe equipment and a reasonably safe place to work.

Since there was a duty owed the New York Court of Appeals approved the submission to the jury of the question "whether failure to comply with such usage and custom constituted a failure to exercise reasonable care under the circumstances."

Since the defendant herein owed no duty to decedent proof of general custom and usage was irrelevant.

(d)

The case of *Lee* v. *Pennsylvania R. Co.* (C. A. 2), 192 Fed. (2d) 226, is not authority for plaintiff. There was no dispute that defendant owed the 3 year old infant plaintiff a duty to exercise reasonable care to make its premises reasonably safe. Proof of custom and usage was held admissible to assist the jury in formulating the standard of care which defendant owed.

In the case at bar, however, it was established by the decisions of the New York Court of Appeals that there was no duty owed by defendant to deceased under the facts in the case.

POINT II

The petition and brief of petitioner present no issues reviewable by this Court.

There is no conflict between the decision of the Court of Appeals for the Second Circuit and the decisions of the New York Court of Appeals.

The decision of the Court of Appeals for the Second Circuit is in accord with the New York law.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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JOHN NIELSEN,
Of Counsel.

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Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1958

No. 863

GLORIA L. MESSINA, as Administratrix of the goods, chattels and credits which were of JOSEPH C. MESSINA, deceased,

Petitioner,

v.

CLARK EQUIPMENT COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

JULIAN BUCHBINDER,
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Respondent states in its brief in opposition (pp. 13-14) that "no action will lie in negligence unless defendant owed a duty to decedent"; that "[g]eneral custom and usage cannot create a duty—it is only evidence to measure reasonable care when a duty is owed"; and that "[s]ince the defendant herein owed no duty to decedent proof of general custom and usage was irrelevant". This in substance is respondent's entire answer to the petition.

1. The question at issue is the liability of a manufacturer under New York law for failure to comply with a general practice or custom of equipping a machine or instrumentality with safety devices or guards to prevent injury to the ultimate user thereof from a danger that is patent and manifest. This question is not whether the manufacturer owes a duty to the ultimate user; rather, the question is one of standard of care, that is, whether the manufacturer created an unreasonable risk of harm to the ultimate user. This is more than a semantic di-

tinction, For if a manufacturer owes no duty to the ultimate user, then the manufacturer would not be liable to the ultimate user irrespective of the nature of the defect in the manufacturer's product (or the unreasonableness of the risk of harm) and this has not been the law in New York ever since the decision in *MacPherson* abolished the doctrine of privity as between the manufacturer and the ultimate user. That the liability of the manufacturer to the ultimate user is governed by generally applicable principles of negligence—the unreasonableness of the risk of harm—is made as clear as language permits in the decision in *Smith* v. *Peerless Glass Co.*, 259 N. Y. 292, 295 (1932), where, in holding the manufacturer of bottles liable for failure to use ordinary and customary methods to detect defects in the bottles and in further holding the bottling company not liable since there was no evidence that it failed to use any tests customarily used by bottling companies, the New York Court of Appeals stated:

> "There emerges, we think, a broad rule of liability applicable to the manufacturer of any chattel, whether it be a component part or an assembled entity. Stated with reference to the facts of this particular case, it is that, if either defendant was negligent in circumstances pointing to an unreasonable risk of serious bodily injury to one in plaintiff's position, liability may follow though privity is lacking. Ref. The American Law Institute, Restatement of the Law of Torts, sections 265 and 266."

Indeed, the decision by the New York Court of Appeals in *Campo*, itself, views the question as being one of standard of care (or the unreasonableness of the risk of harm), for it is stated therein that "entirely lacking is any allegation of fact indicating that defendants foresaw or should reasonably have foreseen a danger to one using the machine for its intended purpose" (301 N. Y. 468, 472; petition, Appendix D, p. 31). And, as Judge Clark pointed out below, "Here, we have both the allegation

and the proof of the facts [a general industry practice of installing safety devices] absent in the *Campo* case" (petition, Appendix A, p. 17). Consequently, respondent's contention that its failure to comply with the general customs and usage of its trade is immaterial because it owed no duty to decedent is untenable. (Of course, if by the term "duty" respondent means the liability of manufacturer to the ultimate user in the circumstances of this case, then this simply assumes the result below and begs the entire question.)

2. Nor can the result reached by the majority of the court below be justified on the ground that as a matter of law respondent did not fall below the required standard of care (or did not create an unreasonable risk of harm) because the danger in question was manifest or readily observable. For respondent tacitly, and necessarily, concedes that the owner of a building, for example, may be liable to the ultimate user of an elevator or escalator therein if such elevator or escalator does not have the customary safety devices or guards to prevent injury, even though the danger is manifest (respondent's brief, p. 14). This was so held by the New York Court of Appeals in *Regan v. Eight Twenty Fifth Corp.*, 287 N. Y. 179 (1941) (elevator) and by the court below in its prior decision in *Lee* v. *Pennsylvania R. Co.*, 192 F. 2d 226 (2nd Cir. 1951) (escalator). (Respondent's rationalization of these decisions on the ground that in *Regan* and *Lee* the defendant owed a duty to the plaintiff whereas here respondent owed no duty to decedent is untenable, as has been seen.) Thus, as responent (and perforce the majority of the court below) reads New York law, the owner of a building may be liable to the ultimate user for the *manufacturer's* negligence in failing to equip his machinery with customary safety devices or guards (even though the danger is manifest) but no action will lie against the manufacturer, himself, the person upon whom the primary responsibility should reasonably rest. This

clearly is an absurd result and is simply the archaic doctrine of privity all over again. The decision by the majority of the court below cannot possibly be justified by the holdings in the *Campo* and *Inman* decisions or by the language of those decisions read in context. The decision by the majority of the court below is clearly contrary to the unmistakable movement of New York decisional law away from the archaic and repudiated doctrine of privity ever since *MacPherson*, e.g., *Smith* v. *Peerless Glass Co.*, *supra*, and it turns the clock of New York law backwards. Indeed, in *Inman*, itself, the New York Court of Appeals extended *MacPherson* to abolish the doctrine of privity as between architect and builder on the one hand, and ultimate user, on the other.

3. Respondent states in its brief (pp. 4-5):

> "John Briante had never seen the decedent get out of the cab when the bucket was not fully lowered (48a). About two months after the machine was obtained, when he saw some machine operators get out of the cab when the bucket was not on the ground, he warned them against doing so, not because he had read in the Manual that it was a dangerous practice, but he knew it was dangerous (47a, 48a, 49a)."

The "he" in the second sentence is John Briante, not decedent. The question of decedent's contributory negligence, if any, which of course is a matter for the jury, is not in issue here since petitioner's case was dismissed as a matter of law on the issue of respondent's negligence.

Respectfully submitted,

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May 28, 1959.